Supreme Court, U. S.
FILED
JUL 23 1980
MICHAEL RODAK, JR., CLERK

No. 80-98

IN THE

Supreme Court of the United States

October Term, 1980

CLIFFORD ROGERS AND VIRGINIA ROGERS,
Appellants,

v

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
NATIONAL WOOD PRESERVERS, INC.,

Appellees.

TOWNSHIP OF HAVERFORD, Intervenor.

On Appeal From the Supreme Court of Pennsylvania.

APPELLANTS' JURISDICTIONAL STATEMENT.

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OPINIONS BELOW.

The Opinion of the Supreme Court of Pennsylvania dated April 24, 1980, affirming the Orders of the Commonwealth Court of Pennsylvania, is reported at — Pa. —, 414 A. 2d 37 (1980) and is found in the Appendix at A-1. The Opinion of the Commonwealth Court of Pennsylvania, dated May 24, 1978, affirming in part and reversing in part the Adjudication and Order of the Environmental Hearing Board, is reported at 35 Pa. Commonwealth Ct. 443, 387 A. 2d 142 (1978) and is found in the Appendix at A-25. The Adjudication and Order of the Environmental Hearing Board, dated July 30, 1976, is unreported and is found in the Appendix at A-48. A prehearing Opinion of the Environmental Hearing Board denying a Petition to Join Samuel Jacoby as an additional defendant is reported as of *In Re National Wood Preservers, Inc.*, 64 D. & C. 2d 78 (1974) and is found in the Appendix at A-91.

JURISDICTION.

The Act of June 22, 1937, P. L. 1987, known as the Pennsylvania Clean Streams Law, was enacted in 1937. In 1965, that law was amended to include Section 316 which gave the State the power to order a landowner or occupier to give access to the land so as to enable the Commonwealth or its appropriate agency to enter upon the land and eliminate a condition of pollution.

Section 316 itself was amended on July 31, 1970, so as to further broaden and extend the powers of the Commonwealth to eliminate a condition of pollution by allowing the Commonwealth to elect to place responsibility for such elimination upon the landowners and occupiers without consideration of fault and solely by virtue of their status as landowners and occupiers. Section 316 now provides in part as follows:

> "691.316 *Responsibility of Landowners and Land Occupiers*
>
> Whenever the Sanitary Water Board finds that pollu-

> tion or a danger of pollution is resulting from a condition which exists on land in the Commonwealth, the Board may order the landowner or occupier to correct the condition in a manner satisfactory to the Board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any persons holding title to or having a proprietary interest in either surface or subsurface rights." [Act of June 22, 1937, P. L. 1987 Article III, Sec. 316 *as amended July 31, 1970,* P. L. 653, 35 P. S. Sec. 691.316]

This Appeal has its origins in three identical Enforcement Orders issued by the Appellee, Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter referred to as "DER") to National Wood Preservers, Inc. (hereinafter referred to as "Wood"), Shell Oil Company (hereinafter referred to as "Shell") and Philadelphia Chewing Gum Corporation (hereinafter referred to as "Gum"). The Enforcement Orders directed each of the above entities to take action to eliminate a condition of pollution on the properties which they owned or occupied. Gum was a property owner and Wood and Shell were lessees of the Appellants, Clifford E. and Virginia Rogers.

DER stated that the properties involved were subject to a contaminant consisting of creosote containing pentachlorophenol and that it was entering into a stream known as "Naylor's Run". Under those Orders, the original three entities were directed to proceed to locate the area of the pollutant, develop plans for removal, and then to remove the contaminant from ground and surface waters so as to restore the waters to their natural quality. (See Orders of DER dated July 12, 1973, found in the Appendix at A-116 & A-118.) Subsequently, on September 21, 1973, a

similar Order was issued to Appellants Clifford A. and Virginia Rogers (hereinafter referred to as "Rogers") (R. 31a, 32a). All of the persons and entities, including Appellants, filed timely appeals from the Orders with the Pennsylvania Environmental Hearing Board (hereinafter referred to as "Board") and all such Appeals were consolidated for hearing.

After lengthy and protracted hearings, the Board, by Adjudication and Order dated July 30, 1976, sustained the Appeals in part and dismissed other parts thereof. [See Adjudication of Environmental Hearing Board dated July 30, 1976, Appendix at A-48].

Appellants Rogers and all other entities and persons filed timely Appeals from the Adjudication and Order to the Commonwealth Court of Pennsylvania. These various Appeals were consolidated by the Court, and a Supersedeas was granted. After filing of briefs and oral argument, the Commonwealth Court of Pennsylvania issued an Opinion and Order sustaining in full the Appeals of Gum and Shell and dismissing the Appeals as to Wood and Rogers. [See Opinion and Order of the Commonwealth Court, Appendix at A-25].

Appellants Rogers on June 23, 1978, filed a timely Petition for Allowance of Appeal with the Supreme Court of Pennsylvania seeking a review of the Opinion and Order of the Commonwealth Court of Pennsylvania. Similar Petitions for Allowance of Appeal were filed by Wood and DER. After consideration of the Petitions, the Supreme Court of Pennsylvania, on February 16, 1979, granted the Petitions for Allowance of Appeal and the matters were consolidated for Argument on Appeal.

After the filing of briefs and oral Argument, the Supreme Court of Pennsylvania, on April 24, 1980, issued its Opinion and Final Judgment in this case dismissing the Appeal of the DER as being not timely filed and sustaining and affirming the Opinion and Orders of the Common-

wealth Court of Pennsylvania as to Appellants Rogers and Wood.

The principal attack of Appellants Rogers at all stages of these proceedings has been that Section 316 of the Pennsylvania Clean Streams Act of July 31, 1970, P. L. No. 222, 35 Pa. Stat. Anno. 691.316 violated the due process provisions of the Fourteenth Amendment to the United States Constitution in that it subjected them to an unconstitutional burden without consideration of fault merely by virtue of their status as landowners.

A timely notice of Appeal to this Court was filed with the Prothonotary of the Supreme Court of Pennsylvania on July 10, 1980, and it is found in the Appendix at A-107. Your Honorable Court has jurisdiction over this Appeal pursuant to 28 U. S. C. 1257(2). This Appeal lies directly with your Honorable Court since the Supreme Court of Pennsylvania, the highest Court of that Commonwealth, has upheld the provisions of Section 316 of the Pennsylvania Clean Streams Law as against a challenge that it is unconstitutional on its face and as applied to Appellants Rogers. *Cohen v. California,* 403 U. S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971).

It is noted that the Supreme Court of Pennsylvania declined to rule on a specific challenge to the constitutionality of Section 316 on the basis of the Constitution of the Commonwealth of Pennsylvania and other state grounds. That Court rather, elected to rule directly upon the challenge of Appellants Rogers to Section 316 pursuant to the due process provisions of the Fourteenth Amendment of the United States of America. That Court has, thus, entertained and ruled adversely to the Appellants Rogers that Section 316 is constitutional. By virtue of that ruling, your Honorable Court has jurisdiction to hear an Appeal of this case. 28 U. S. C. 1257(2); *Hancock National Bank v. Farnum,* 176 U. S. 640, 20 S. Ct. 506, 44 L. Ed. 619 (1900); *Henderson Bridge Co. v. City of Henderson, Ky.,* 173 U. S. 592, 19 S. Ct. 553, 43 L. Ed. 823 (1899).

It is by virtue of that jurisdiction rather than certiorari jurisdiction that this matter comes before your Honorable Court as a matter of right.

QUESTION PRESENTED FOR REVIEW.

Has the Commonwealth of Pennsylvania engaged in an unduly oppressive exercise of its "police power" in violation of the due process clause of the 14th Amendment to the United States Constitution, where the Pennsylvania Clean Streams Law was amended subsequent to the acquisition of land by an owner so as to impose liability upon the owner solely by virtue of the status of landowner to remove and eradicate, at an unlimited cost, a condition of pollution not created by the landowner which is partially under the property owned by the landowner and which was created by the unlawful acts of a third party to which unlawful creation the landowner has not contributed and which has no reasonable connection with the landowner's ownership of the property?

STATEMENT OF THE CASE.

This Appeal arises out of the ownership by Appellants Rogers of a certain portion of land on the north and south sides of Eagle Road between its intersection with Lawrence Road on the west and Hillcrest Road on the east in Haverford Township, Delaware County, Pennsylvania. That property has been owned by the Appellants since the 1940's (R. 187a). The Appellants have not engaged in any business activity on their property since the 1940's. Since that time, the Appellants' property has continuously been occupied by tenants operating their own businesses (R. 188a, 198a).

On January 10, 1947, Appellants leased their land to Samuel T. Jacoby and C. David Jacobs who ultimately assigned their rights under the lease to National Wood Preservers, Inc., a corporation which was controlled by Jacoby. National Wood Preservers, Inc., by Jacoby, con-

ducted a wood preservative business on this parcel of land between March 28, 1947 and July 30, 1963. National Wood Preservers, Inc., by Jacoby, utilized a substance known as pentachlorophenol in this wood preservative business and during the course of the operation of this business under Jacoby's ownership waste liquids were discharged or permitted to be discharged from the surface of the land upon which said business was conducted to the ground water via a well on the premises.

On July 30, 1963, Jacoby sold his entire interest in the corporation to the Goldstein family and that family has operated the wood preservative business on all or a portion of the Appellants' land to the present date. The present Appellee, National Wood Preservers, Inc., is the corporation as owned, controlled and operated by the Goldstein family.

On February 10, 1967, Wood released a portion of the premises owned by Appellants from its leasehold and on that date Appellants leased that portion to Shell. Shell has operated and maintained a gasoline service station on the parcel of land at all times from that date to the present time.

Gum owns and occupies land south of Eagle Road and contiguous thereto. Intervenor Township of Haverford is the local municipal government body in which all of the land is located.

On July 12, 1973, the Department of Environmental Resources issued orders with respect to Wood, Gum and Shell directing each as owners or occupiers of the property to develop engineering plan designed to remove the contaminants, pentachlorophenol and oil, which have been located under the lands of the Appellants and the said Appellees (R. 27a, 28a). On September 21, 1973, DER issued an order with respect to Appellants requiring them to: (1) define the specific geographical area in which the pollutant is found; (2) prepare a profile of the ground water table in the area in which the pollutant is found;

and (3) formulate a proposal to remove the pollutant. All Appellees and Appellants filed timely appeals to the Environmental Hearing Board.

The evidence, submitted on behalf of Wood, demonstrates that the accumulation of pentachlorophenol and oil allegedly existing on the Appellants' land was created by Wood through the actions of its former president and sole stockholders, Samuel T. Jacoby (R. 376a). A Petition, filed by Shell, sought to join Jacoby as an additional defendant (R. 179a). However, that Petition to join was denied (R. 179a). Thirteen hearings were held before Louis R. Salamon, Esquire, Hearing Examiner for the Environmental Hearing Board. During these hearings it was stipulated that the orders issued by DER were based on Section 316 of the Clean Streams Act of July 22, 1937, as amended (35 P. S. 691.316) (R. 187a). While the specific area of contamination was never defined, it allegedly existed far beyond the properties owned by the Appellants (R. 508a, 509a). During these hearings, no evidence was produced by DER or any other Appellee as to the Appellants Rogers having caused the pollution in any way or ever having knowledge of the same.

At the conclusion of the hearings before the Examiner and after deliberation, the Board entered an Adjudication and Order in which it specifically found that Wood, under Jacoby, had created the pollution condition; however, it ordered the Appellants and the other Appellees to proceed in accordance with its modification of DER's Order.

The Adjudication of the Environmental Hearing Board.

The Board found that the pentachlorophenal in question was under the surface of the property lease by Appellants Rogers to Shell and Wood; that this pentachlorophenol flowed southwesterly under Eagle Road, a highway owned and maintained by the Commonwealth of Pennsylvania, and that thereafter it infiltrated under the surface of property owned by Gum into a storm sewer pipe on

the property of Cum, maintained by Intervenor, Township of Haverford, and that the pentachlorophenol traveled through the storm sewer pipe and was discharged at its terminus into Naylor's Run. [See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact 72, A-70].

The Board determined that the pentachlorophenal is under the property owned and maintained by the Commonwealth of Pennsylvania and the Township of Haverford and by landowners or occupiers, the identity of whom or which were not disclosed in the proceedings before it. [See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact 74(b), A-70—A-71].

It found also that in order to determine the volume of pentachlorophenol under the surface of the property owned or leased to Appellees, including Wood and how widely the pentachlorophenol was disbursed thereunder, many more wells would have to be drilled on the property to the water table and additional samples from these wells taken. [See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact 76, A-71].

It found finally that it was impossible to assess the cost of the removal program until further drilling, testing and sampling was completed; and, that the participation of landowners and occupiers, in addition to the Appellants, would be necessary in order to complete the drilling, testing and removal program. [See Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact 78 and 79, A-72].

All Appellants challenged the constitutionality of Section 316 of the Clean Streams Law on the basis that it was unconstitutional since it punishes a "status" and required them to assume responsibility to correct a condition which none of them caused, created or were at fault in continuing (R. 192-197; 33-35). They also challenged the constitutionality of Section 316 on the grounds that it was invalid ex post facto legislation (R. 192-197; 33-35).

As to all such attacks on the constitutionality of Section 316 of the Clean Streams Law, the Environmental Hearing Board ruled that it did not have the authority to pass upon the constitutionality of Section 316 of the Clean Streams Law and that it would assume the constitutionality thereof for the purposes of its Adjudication. [See Adjudication of Environmental Hearing Board, dated July 30, 1976, A-48].

Appellants also argued and contended that the DER was applying Section 316 in an unconstitutionally discriminatory fashion particularly because of its failure to include in the proceedings, Jacoby as the party who had created the polluting condition and other property owners, including the Township of Haverford and the State Department of Highways, under whose property the polluting condition was also found to exist. Prior to the hearings before the Environmental Hearing Board, Shell had petitioned to join Jacoby as an additional defendant, pursuant to the State Civil Procedural Rules, on the basis that he was the party responsible for causing the condition. DER opposed this joinder and the Board sustained that position, denying the Petition on the grounds that only DER had the authority to bring Jacoby upon the record. *In re National Wood Preservers*, 64 D. & C. 2d 78 (1974), A-91. DER at no time sought to join Jacoby in those proceedings.

In its Adjudication, the Board in dismissing the contentions of discriminatory enforcement, alluded to the fact that Section 316 of the Clean Streams Law permitted DER to ignore the issue of fault in proceeding to recover clean-up costs. It stated:

> ". . . Section 316 clearly authorizes the Department to ignore the issue of fault, as it is done here, and proceed against whoever owns or occupies land so as to remedy a pollution problem as quickly as possible. We might prefer a more delicate balancing of responsibility in the Department's actions, but we cannot

say that their approach is unauthorized." [Adjudication of Environmental Hearing Board, July 30, 1976, Footnote 13, A-84].

The Board also ruled that it would cure any problem with respect to the issue of discriminatory enforcement by restricting any Order against the Appellants to that they would be required to take corrective measures only upon property owned or occupied by them and would not be required to take corrective action outside of the geographical boundaries of the property which they owned or occupied. [See Adjudication of Environmental Hearing Board, dated July 30, 1976, A-48].

After disposing of all of the arguments raised by the various Appellants in the proceedings before it, the Board issued its Adjudication.

The Commonwealth Court Decision.

On Appeal, the Commonwealth Court ruled that Section 316 could not constitutionally be applied to any of the parties before the Board based solely upon their ownership or occupancy of land. It stated:

"Applying these legal principles to the facts of this case, we believe that requiring these Appellants to spend the financial sums necessary to abate this condition, based solely upon their ownership or occupancy of land, would be to employ means unduly oppressive upon these individuals. We believe that such an exercise of police power would transcend 'the parameters of reason'. We believe that EHB's conclusion that Section 316 is a declaration of the strict liability of these Appellants to correct the condition is erroneous as a matter of law because such a construction of Section 316 would permit the Commonwealth to engage in regulation which constitutes the taking of property without compensation, and hence, would be an unconstitutional exercise of police power." [See Opinion of Commonwealth Court, A-38—A-39]

The Court went on, however, to point out that:

> "Where a statute can be given two constructions, one of which will render it constitutional and the other unconstitutional, the former construction must be invoked." [See Opinion of Commonwealth Court, A-39]

Relying on this principle, the Court held that there was a construction of Section 316 which:

> "both comports with the law of public nuisance and renders that section constitutional as applied to the factual situation present in this case." [See Opinion of Commonwealth Court, A-39]

As stated by the Court, where a polluting condition has been created by the conduct of an individual other than an owner or occupier of land, that owner or occupier can be ordered to take corrective measures if he permitted or authorized the creation of the condition on its land. Such an owner or occupier can also be ordered to take corrective measures if after knowing of the existence of the condition on his land, he engages in some affirmative conduct indicating his adoption of the condition. The Court stated in its Opinion:

> "The key to imposing liability under Section 316 upon an owner or occupier for the correction of a condition which he did not create is that such an owner or occupier, after knowing of the condition, engages in some affirmative conduct indicating his adoption of the condition. Essentially, this theory of liability for owners or occupiers who do not create the condition is an application to Section 316 of the Common law liability of owners or occupiers who 'continue' or 'adopt' a nuisance not created by them. *See* 66 C. J. S. *Nuisances* Sections 83-89 (1950); 58 Am. Jur. *Nuisances* Sections 48-56 (1971)." [See Opinion of Commonwealth Court, A-40]

The Commonwealth Court, in its Opinion, applied the Common Law Doctrine of Nuisance so as to preserve the constitutionality of Section 316 and it specifically found that Appellants Rogers, by receiving rental from Wood, adopted and ratified the illegal conduct. That Court, in its Opinion, specifically found that there was no evidence of Appellants Rogers having knowledge of the illegal activities of Wood through its representative, Mr. Jacoby.

Following the Opinion and Order of the Commonwealth Court, Appellants Rogers filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was granted as of No. 67 January Term, 1979, and which was consolidated with Appeals filed by Wood and DER.

Removal Cost Information Submitted With Request for Continuation of Supersedeas.

After the Commonwealth Court had issued its Opinion and while Wood's Petition for Review was pending in the Pennsylvania Supreme Court, Wood filed with the Commonwealth Court, a Petition for Continuation of Supersedeas previously entered.

Among other allegations which were made apart of the record subsequent to hearings before the Environmental Hearing Board, that Petition pointed out the following:

On October 28, 1976, the Federal Environmental Protection Agency advised Wood that it was going to remove the polluting condition. At that time, it believed that the total cost of removal would range between Fifty Thousand ($50,000.00) Dollars and Two Hundred Thousand ($200,000.00) Dollars.

On November 2, 1976, the EPA, using a private contractor, commenced work on the site. Less than two (2) months later, One Hundred and Eighteen Thousand ($118,000.00) Dollars of cost had been incurred. As of June 2, 1977, the EPA had spent approximately One

Hundred and Eighty Thousand ($180,000.00) Dollars and had discontinued major efforts to remove the pollutants awaiting the outcome of these proceedings.

Wood, in this Petition, stated that it believed that the One Hundred and Eighty Thousand ($180,000.00) Dollars spent in the time that the EPA was on the site only paid for the removal of a small amount of the pollutant which Wood believes would be substantially in excess of that sum.

On July 3, 1980, the Commonwealth Court ordered that the Supersedeas should remain in effect "pending disposition of the Appeal."

Proceedings in the Pennsylvania Supreme Court.

Appellants Rogers argued in the Supreme Court of Pennsylvania that the Commonwealth Court had erred in finding that they adopted the polluting condition by affirmative conduct in receipt of rental payments submitting that such conduct was so insubstantial and unrelated to the illegal use of the property, that it did not constitute in any way an adoption or ratification of the illegal conduct which in fact violated the lease with Wood signed by Mr. Jacoby. It was further argued that Section 316 was unconstitutional as a violation of the due process provided under the Fourteenth Amendment to the United States Constitution.

The Pennsylvania Supreme Court's Decision.

The Pennsylvania Supreme Court in its Opinion of April 24, 1980, acknowledged that this was "a case of first impression", calling for the construction and a determination of the constitutionality of Section 316 of the Clean Streams Law. *National Wood Preservers, Inc. v. Commonwealth of Pennsylvania, Department of Resources,* — Pa. —, 414 A. 2d 37 (1980) [See Appendix at A-1].

> "The principal questions presented by this appeal are whether Section 316 authorizes the Department of

> Environmental Resources to remedy water pollution resulting from conditions other than mine drainage, and whether Section 316 is a constitutional exercise of the Legislature's police power." [414 A. 2d at page 39]

The Court first found that this section properly applied to pollution from conditions other than mine drainage. It then took up the question of the Statute's constitutionality, stating,

> "Appellants' second contention is that Section 316 of The Clean Streams Law is an impermissible exercise of the police power, in violation of the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution." [414 A. 2d at page 42]

The Court then made clear that it would not decide the case on State law concepts of "fault", causation or the theory of "adoption" articulated by the Commonwealth Court, but rather would deal directly with the constitutional question presented.

The Court stated that it disagreed with Appellant's argument, held Section 316 to be a constitutional exercise of the State's police power:

> "We disagree. First it is absolutely clear that the corrective orders here are based on much more than mere ownership or occupancy. As discussed above, they are based upon legislation designed to eliminate all water pollution, and the Environmental Hearing Board's findings that a substance, determined to be pollution, redies under appellant's land and can feasibly be removed. There is thus a reasonable and concrete basis for the corrective orders here." [414 A. 2d at page 45]

The concurring opinion of Justice Flaherty stated that the majority opinion was actually providing for an unconstitutional imposition of liability, based solely on ownership or occupancy of property. He, therefore, concurred only in the result since he accepted the theory of "adoption" articulated by the Commonwealth Court. He said:

> *"A reading of the majority opinion might lead to the belief that we adopt the strict liability construction of Section 316 which would compel the expenditure of financial sums by an owner or occupancy (sic) of land based on no other factor but the ownership or occupancy of the land."* [414 A. 2d at page 47, Concurring Opinion, A-21] (Emphasis added)

* * *

Justice Flaherty then stated his belief that an exercise of the police power had to be associated with the *use* to which one puts his property and not his mere ownership or occupancy. He said:

> *"It has always been recognized that the 'right' of property ownership carrier with it a concurrent 'obligation' which is inherent in the basis relationship of an 'owner' of property to society. These 'obligations', however, have always related to the use one puts to property, not mere ownership. To construe the subject Act as providing for strict liability, based on nothing more than the ownership or occupation of land, would be to impose on innocent individuals, the burden which should be borne by society as a whole, thus, an unconstitutional taking. I, thus, concur only in the result."* [414 A. 2d at page 48; Concurring Opinion, emphasis added, A-23—A-24]

Notice of Appeal from the Court's Judgment to the Supreme Court of the United States was filed with the Lower Court on July 10, 1980.

THE SUBSTANTIAL FEDERAL QUESTIONS.

Appellants Rogers challenged the constitutionality of Section 316 of The Pennsylvania Clean Streams Act under the Fourteenth Amendment to the Constitution of the United States asserting that it violates due process in that it imposes unlimited liability upon them for the removal of a pollution condition from their property which condition they did not creat or adopt solely by virtue of their status as landowners. The Supreme Court of Pennsylvania, in affirming the constitutionality of Section 316, based upon mere status as an owner and the geographical location of a polluting condition, has so drastically infringed upon the personal and property rights of the Appellants Rogers as to be oppressive.

If Section 316 based upon the decision of the Supreme Court of Pennsylvania were to be applied in the event there had been an escape of radioactive material from "Three Mile Island" which contaminated the ground water and stream on an owner's property, it would require the owner, who was blameless, to expend an unlimited sum of money to remove that radioactive pollution. To apply such a statute in the State of New York would allow those owners of property in the vicinity of "The Love Canal" to be required to bear the unlimited cost of removing the toxic pollutants which they did not even know existed let alone were they responsible for their creation. The effect of Section 316 is clearly to allow a state, in this instance the Commonwealth of Pennsylvania, to ignore fault in determining responsibility for the clean-up of polluting conditions. It allows a state to merely impose by order, the responsibility solely by virtue of the status of landowner or land occupier.

The "police power" of the state must be reasonably and prudently applied. The exercise of the "police power" in Section 316 creates, as set forth above, a situation which has not yet been judicially reviewed by your Honorable Court.

This is not a case in which the state has exercised its "police power" to place a mere prohibition or restriction upon a lawful use of property which reduces the economic value of the property as in municipal zoning. [See *Hadacheck v. Sebastian,* 239 U. S. 394, 60 L. Ed. 348, 36 S. Ct. 143 (1915); *Goldblatt v. Town of Hempstead,* 369 U. S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962)].

It is also not a case in which a state orders a property owner to destroy a portion of his property in order to preserve other property. *Miller v. Schoene,* 276 U. S. 272, 48 S. Ct. 246, 72 L. Ed. 568 (1928).

Further, it is not a case in which a state, by virtue of the use of a property owner of the property, imposing affirmative cost obligations such as requiring noise, water and air pollution controls at a manufacturing or chemical facility. See, *Queenside Hills Realty Co., Inc. v. Saxl,* 328 U. S. 80; 90 L. Ed. 1096 (1946); *Atchison, Topeka & Santa Fe R. Co. v. Public Utilities Commission,* 346 U. S. 346, 74 S. Ct. 92, 98 L. Ed. 51 (1953); or in which a limited fine, as distinguished from unlimited clean-up costs, is imposed upon a property owner for the negligent or criminal act of a third person, but *which could only have occurred because of the property owner's use of its property or operation of its business. United States v. General Motors Corporation,* 403 F. Supp. 1151 (D. Conn. 1975); *United States v. Marathon Pipe Line Co.,* 589 F. 2d 1305 (7th Cir. 1978); *United States v. Tex-Tow, Inc.,* 589 F. 2d 1310 (7th Cir. 1978).

As has been previously noted, the Environmental Hearing Board specifically found that the polluting condition was created by the activities of Mr. Jacoby, an executive officer of Wood. There is no evidence in the Record as specifically found by the Commonwealth Court on its review that the Appellants Rogers had any knowledge of its existence.

This is not even a case involving an innocent owner's forfeiture of property because of the criminal acts of his

Lessee. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 40 L. Ed. 2d 452, 94 S. Ct. 2080 (1974).

Finally, this is not a case in which a landowner or occupier is assessed for improvements made in front of the property occupied by him. Such assessments are uniformly upheld only to the extent that special benefits accrue to the property assessed. See 16A C. J. S. Constitutional Law, Section 661, pgs. 1035-1042 and particularly, at pages 1037, 1038 and cases therein cited. In the present case, no claim is made that removal of the pollutant will benefit the Appellants who are the owners of the land.

Rather, what is at stake in the present case is the propriety of a State's raw, naked right through the use of its "police power" to impose on a landowner or occupier, the affirmative obligation to eradicate, at unlimited costs, a polluting condition, based on nothing more than that land owner's status and geographical proximity to the condition in question.

If the validity of this Statute is affirmed without further consideration by this Court, it may signal legislatures in other states desirous of attacking pollution problems, that they may now abandon previous statutory enactments designed to strike an acceptable balance between accomplishing desirable environmental goals and protecting the rights of private individuals, in favor of expedient, but oppressive laws which eliminate any consideration of such rights.

The Pennsylvania Supreme Court has Misconstrued Prior Holdings of This and Other Courts in Dismissing Appellant's Contention That the Statute Is Unduly Oppressive.

The analysis of the constitutionality of Section 316 as applied by Pennsylvania's highest court in this case is wanting in several respects. First, its analysis partly rest upon a consideration of economic impact of state law found in cases dealing with regulation of uses of property

which, as well be explained below, have little bearing on this case. Secondly, it deals with Appellant's objection that the Statute is unduly oppressive without considering the elements of retroactivity, the fact that the Statute permits and authorizes abdication by State officials of their responsibilities to pursue the individual who actually caused the polluting condition, and without considering the serious potential for abuse in enforcing this law where, as here, a polluting condition affects the property of several innocent owners or occupiers of contiguous properties. Finally, the Court ignored the oppressive manner of enforcement contained in the record of these proceedings and contributed to that result by affirming a series of conflicting orders which are thereby made internally inconsistent and incapable of fair applications.

The decision in this case by the Pennsylvania Supreme Court does not blend neatly with any of the past holdings of this Court. Appellants' belief that the Statute is "unduly oppressive", is founded upon a multi-faceted combination of factors not present in the cases cited by the Pennsylvania Supreme Court as precedents:

(1) The government is not merely regulating past "use" of the property by the party to be charged with liability, but rather is taking resources from the most expedient source at hand.

(2) The Statute imposes strict liability upon a land owner or occupier for the illegal act of a third person without any requirements on the State to proceed against the third person who created the polluting condition.

(3) The strict vicarious liability is being imposed retroactively.

(4) The statute as applied has harsh consequences which impair the contractual expectations of occupiers of land such as short term tenants and will

have serious impact on the expectations of past purchasers of the property.

(5) The provision of the Statute which gives unlimited discretion to the law enforcement agency with respect to what may be required by way of compliance is subject to abuse.

(6) The selective enforcement techniques being used in the enforcement of this Statute, as illustrated in this case are onerous and oppressive and may well rise to a level of denial of equal protection under the law.

It is submitted that the collection of features as found in Section 316 and as interpreted by Pennsylvania's highest court are sufficient to overcome any presumption concerning the constitutional validity of mislegislative enactment.

The Government Is Not Merely Regulating Past or Present "Use" of the Property by the Party to Be Charged With Liability, But Rather Is Taking Resources From the Most Expedient Source at Hand.

It is erroneous to pass on the validity of this Statute based solely upon cases which deal with the tension between limitations or regulations concerning the use of property and the fifth amendment proscription against government taking of private property for public purposes without compensation. See generally J. L. Sax, *Takings and the Police Power*, 74 Yale L. J. 36 (1964). The question in such cases is whether regulation or prohibition of uses of property is so onerous as to constitute a "taking". And, as the Supreme Court of Pennsylvania has pointed out, reduction of property value due to regulation as to use has to be complete before there is a "taking". *Hadacheck v. Sebastian, supra; Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922). Further, it has been held that where complete destruction

of private property used in an individual's business enterprise—although otherwise legal—is reasonbly necessary to protect the rest of the community, the destruction of that property does not constitute a compensable taking. *Miller v. Schoene, supra.*

If a complete loss of property can be justified for the purpose of ensuring the safety for the rest of the community, does this mean that there is no limit on the police power? Even in *Miller v. Schoene, supra,* the owner of the offending trees which were destroyed for the public good was not required to pay for the cost of destroying or removing them.

Appellant believes that the reduction-in-value analysis, cited by the Pennsylvania Court in its Opinion, is not relevant here because the Statute under present consideration does not seek to regulate any particular use of property. Appellants are not asked to change the use of their property. Appellants are not prohibited from putting their property to a proposed more profitable use because of zoning, or regulation such as was encountered in *Penn Central Transportation Co. v. New York,* 438 U. S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), relied on so heavily by the Pennsylvania Court. What remains is that Appellants are being asked to eradicate pollution which is present under the surface of property which they lease to Wood. The "taking" does not need to be found through a complex analysis of whether or not the government is prohibiting some valuable use of property, or is physically occupying it such as was found in *Causby v. United States,* 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946). The government is simply forcing the Appellant to take affirmative action at enormous expense without regard to the use of their property.

All of the cases cited by the Pennsylvania Court requiring the positive expenditure of funds seem to involve more than mere ownership or occupancy of property, i.e.

they involve regulating or prohibiting activity on the property related to the use of that property. Thus, in *Queenside Hills Realty, Co., Inc. v. Saxl, supra,* the required expenditures were for fire safety equipment related to the safe operation of a rooming house. In *Goldblatt v. Town of Heampstead, supra,* the Statute required the operator of a quarry to fill existing holes as a condition to the continued operation of its business. In *Penn Central, supra,* the statute prohibited certain new construction and required a railroad to maintain its terminal which was designated as a historic landmark. Preservation of the property had the dual benefit of meeting the objectives of New York's landmark regulation, *and* of maintaining property used in the railroad's business.

In *Queenside,* the property owner had the choice of submitting to the regulation or ceasing his business operation. In *Goldblatt, supra,* the regulation in question imposed affirmative duties, under penalties of fine and imprisonment, of refilling the existing excavation and constructing a new fence. However, it is important to note that the Court in *Goldblatt* never ruled on the validity of those affirmative duties, since enforcement of the affirmative duties was not sought in the litigation before the Court.

The Statute Imposes Strict Liability Upon a Land Owner or Occupier for the Illegal Act of a Third Person Without Any Requirements on the State to Proceed Against the Third Person Who Created the Polluting Condition.

The pollution in question was caused by the illegal, criminal acts of a third person, Jacoby.

The state court has cited modern cases imposing vicarious liability on landowners for the negligent acts of third persons. See, i.e., *Portland Pipe Line v. Environmental Improvement Commission,* 414 U. S. 1035, 94 S. Ct.

532, 38 L. Ed. 2d 326, dismissing appeal for want of a substantial federal question, 307 A. 2d 1 (Me. 1973); *Gulf Oil Corp. v. United States,* 573 F. 2d 1303 (3rd Cir., 1978). The distinguishing characteristic of those cases is that the activity of the third party polluter was required to be connected in some reasonable fashion to the furtherance of the business activity of the party held responsible.

Although the Pennsylvania Supreme Court has indicated that neither it nor the Environmental Hearing Board has had the issue of ultimate allocation of liability before it, the result is that Rogers will be under compulsion to expend funds to correct what is more properly Jacoby's responsibility, and will be left to their own devices to recover from Jacoby. The Statute makes no provision for singling out or proceeding against the actual polluter before seeking compliance from innocent landowners or occupiers who in some cases may in themselves be victims of the polluting activity. If fines and jail terms are to be the catalysts for positive action by innocent parties, it seems anomalous that such compulsion is not provided for use against the guilty party.

There is no factual finding or judicial holding in this case that Appellants Rogers should stand in Jacoby's shoes as an actual wrongdoer or polluter. Section 316 of the Clean Streams Law, at issue here, pursuant to which DER issued the Orders, punishes the status of landowner or occupier. That section of the law did not come into existence until 1970 long after Jacoby had created the polluting condition in question. *Section 316, is, at the very least, quasi-criminal in nature and possibly truly criminal in nature in light of the harsh penalties provided for under Section 602 of the act for failure to comply with an Order issued under Section 316.* [Clean Streams Law, Act of June 22, 1937, P. L. 1987 Article III, as amended July 31, 1970, P. L. 653, 35 P. S. Section 691.316. Section 602, 35 P. S. Section 691.602].

The Strict Vicarious Liability Is Being Imposed Retroactively.

It is not unreasonable to impose vicarious liability upon a party for acts of persons under the dominion and control of the party held responsible. It also may not be reasonable to impose liability retroactively for prior acts of the very party held liable, or persons subject to their control. *Barnes & Tucker Co. v. Pennsylvania,* 472 Pa. 115, 371 A. 2d 461 (1977).

However, it is beyond the pale of reason to impose vicarious liability for the acts of third persons nor had knowledge of the true nature of their acts, based upon a Statute passed by a legislature fourteen (14) years after the occurrence of such acts. *Usery v. Turner Elkhorn Mining Co.,* 428 U. S. 1, 49 L. Ed. 2d 752, 96 S. Ct. 2882 (1976).

While the Court has generally held that retroactivity is a feature to be avoided except in certain appropriate circumstances, *Railroad Retirement Board v. Alton Railroad Co.,* 295 U. S. 330, 55 S. Ct. 758, 79 L. Ed. 1468 (1935), modern law has allowed considerable latitude in permitting retroactive application of regulation legislation, where the cost of the remedy for a problem is allocated to the person charged with the liability under the Statute as an "actual, measurable cost of his business". *Usery v. Turner Elkhorn Mining Co.,* 428 U. S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976). However, a more recent decision of the Court would indicate that retroactivity of legislation is not a factor which can be simply ignored. *Allied Structural Steel v. Spannaus,* 438 U. S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978).

Retroactive liability for the acts of third persons under Section 316 does not require that the polluting condition arise in the course of the landowner or occupier's business and in this respect, does not come under the holding of *Usery v. Turner Elkhorn Mining Co., supra.*

Similarly, this case is not one in which retroactive legislation should be justified based upon an "emergency". *Lichter v. United States,* 334 U. S. 742, 68 S. Ct. 1294, 92 L. Ed. 1694 (1948) [but compare *Louisville Joint Stock Land Bank v. Redford,* 295 U. S. 555, 55 S. Ct. 854, 79 L. Ed. 1593 (1935)]. Nor is this statute justified as one which permits retroactivity because the statute is merely curative of technical ambiguities in prior legislation. *F. H. A. v. The Darlington,* 358 U. S. 84, 79 S. Ct. 141, 3 L. Ed. 2d 132 (1958).

The Statute, as Applied, Has Harsh Consequences Which Impair the Contractual Expectations of Occupiers of Land Such as Short Term Tenants and Will Have Serious Impact on the Expectations of Past Purchasers of the Property.

One of the serious oppressive features of Section 316 is that it tends to introduce new dangers and pitfalls into common transactions such as buying or leasing property. The normal expectation of a purchaser or lessee of surface rights to property is that he will get good title or the right to use property for legal purposes.

What can be expected from this statute are variations of what happened to Rogers in this case. The State, wishing to have instant gratification, will attack the easiest party to find, be it record owner or the person who is present on the land, and use quasi-criminal sanctions to compel a recovery for the purpose of abating polluting conditions. The purchaser or tenant is then free to attempt to pass the liability on to the "proper" party—a task which is difficult at best and likely to be impossible in many cases.

Instead of proper and cooperative efforts with governmental agencies to find and correct polluting conditions, owners or occupiers who discover such conditions, not created by themselves, will be encouraged to conceal the conditions and pass them off to unsuspecting buyers.

The Provision of the Statute Which Gives Unlimited Discretion to the Law Enforcement Agency With Respect to What May Be Required by Way of Compliance Is Subject to Abuse.

The Statute gives unlimited discretion to law enforcement officials to determine what may be required by way of compliance with its own orders. The orders in this case are themselves open ended in that compliance is conditioned upon DER's "acceptance" of plans and specifications of work to be done by Appellant, without any indication as to what standard, if any, will govern the acceptance. Order of Environmental Hearing Board, July 30, 1976. [A-48].

In *Curtin v. Benson,* 222 U. S. 78, 32 S. Ct. 31, 56 L. Ed. 102 (1911), the Court reversed an Order by a representative of the Secretary of the Interior that a certain private property owner within the confines of Yosemite National Park mark and define his lands "by an agreed understanding" with the Secretary's representative. There, the Court observed:

> "A law requiring an owner in Appellant's situation to fence his land might be within such power, though of that we are not required to express an opinion. A law making the trespass of his cattle on other lands a criminal offense might be within such power."
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> * * *
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> "We have assured so far that Benson, the secretary's representative, has exercised a power in accordance with the rules prescribed by the Secretary of the Interior. This, however, may be questioned. The orders of Benson are not the Curtin mark and define his lands, but that he do so 'by an agreed understanding' with him (Benson), so that there could be no subsequent controversy about their boundaries. But this gives to Benson, power to force a concession to

> his 'understanding' and to require Curtin to submit to a limitation to the area of his land or a limitation of its uses. *It is no answer to say that the power would not be arbitrarily or unreasonably exercised. It must be judged by what can be done under it, not what may be done under it.*" (Emphasis added)

Orders in the form upheld by the Court, place Appellants at the mercy of DER and in a position of corporate involuntary servitude. At this writing, almost seven (7) years, to the day, after the issuance of the original DER Orders, and after an expenditure of approximately One Hundred and Eighty Thousand ($180,000.00) Dollars on the pollution problem by the Federal government, there exists no concrete answer as to how much expense and effort by Appellants will be required in complying with the DER orders as modified by the Environmental Hearing Board. It would appear that the DER is free to determine whatever it wishes with regard to the level of compliance expected, without limit.

In addition, DER is in a position to force Appellants to experiment on methods to solve the problem. The experiment activity, if determined by the Board first to be "feasible', will mean that Rogers will be expending funds to devise new methods of dealing with the problem which more properly should be borne by the government.

The Selective Enforcement Techniques Being Used in the Enforcement of This Statute, as Illustrated in This Case Are Onerous and Oppressive and May Well Rise to a Level of Denial of Equal Protection Under the Law.

In its Adjudication, the Board found that the polluting condition not only exists under the property owned or occupied by other parties to the litigation, Gum and Shell, but that it also existed under the property owned and occupied by several other parties, the identification of whom were not disclosed in that proceeding. [Adjudica-

tion of Environmental Hearing Board, dated July 30, 1976, Finding of Fact No. 74, A-70—A-71]. The Board also found that the participation of such landowners or occupiers was necessary to complete the removal program. [Adjudication of Environmental Hearing Board, dated July 30, 1976, Finding of Fact No. 79, A-72]. Finally, the Board held that as applied to Appellant and other parties then before it, Section 316 could require them to correct a polluting condition "only on the land, which is owned or occupied by such person or entity and that it would be 'unconstitutional' to require the Appellant to take action outside his or its land." [See Adjudication of Environmental Hearing Board, dated July 30, 1976, at pages 34 and 35, A-83].

The Commonwealth Court in its Opinion, has by silence, affirmed these findings. It has also removed Shell and Gum from these proceedings. In essence, Rogers, together with Wood, will be required to attempt to remove a polluting condition under their property, which cannot be removed without the cooperation of other landowners or occupiers, who by the lower Court's decision, cannot be proceeded against to give such cooperation. Under these circumstances, requiring it to expend the funds necessary to attempt to remove the pollutant, would be a vain and wasteful act.

Moreover, this situation is not an unusual one. It is probable that in the future, when a polluting condition of a widespread nature is found to exist, it may well be under lands owned or occupied by several different persons or entities, some of whom may be liable to correct the condition and others of whom may not. To the extent that it can be required to exhaust its entire resources in eradicating a condition that cannot be so eradicated without the cooperation of others, then it is believed that said Order is unconstitutional as applied to Appellants.

Therefore, it is submitted to your Honorable Court that Section 316 as applied to the Appellants Rogers is un-

constitutional. The Federal questions raised under the due process amendment to the United States Constitution are substantial and gravely affect the property rights of the Appellants Rogers. It is for these reasons that the questions presented are so substantial as to require plenary consideration with Briefs on the Merits and oral argument before your Honorable Court for their resolution.

CONCLUSION.

It is submitted that in light of all of the foregoing reasons, that your Honorable Court should note jurisdiction in this matter and reverse the Order of the Supreme Court of Pennsylvania.

Respectfully submitted,

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